IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

SA.No. 440 of 1993()

AS.108/1991 of ADL.SUB COURT, THALASSERY
OS.40/1986 of MUNSIF COURT, KUTHUPARAMBA
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PLAINTIFFS/ APPELLANTS/ APPELLANTS
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1. **PONICHERRY SREEDEVI AMMA,**
   KAPPAD AMSOM AND DESOM, TELLICHERRY.

2. **CHANDRAN NAIR, DO. DO.**

3. **THITTAYIL MADHAVI AMMA,**
   W/O.KUNHIKANNAN, DO. DO.

BY ADV. SRI.V.SIVASWAMY
SRI.V.V.ASOKAN

DEFENDANTS/RESPONDENTS/ RESPONDENTS
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1. **FR.SAKHARIYA KOTTAYIL,**
   KAPPAD AMSOM AND DESOM,
   TELLICHERRY.

2. **CHERUPURAYIDATHIL ABRAHAM,**
   S//O.ABRAHAM, KAPPAD AMSOM AND DESOM,
   TELLICHERRY.

3. **CHERUPURAYIDATHIL JOY, DO. DO.**

4. **CHERUPURAYIDATHIL BABY, DO. DO.**

BY ADV. SRI.S.V.BALAKRISHNA IYER - R1 TO R4
SRI.K.JAYAKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 01/ 06 / 1993 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN Nair,J.

S.A.NO. 440 OF 1993

Dated 1st June 2007

J U D G M E N T

Plaintiffs in O.S.40 of 1986 on the file of Munsiff court, Kuthuparamba are appellants. Respondents are defendants. Appellants 1 and 2 originally instituted the suit seeking a decree for permanent prohibitory injunction which was subsequently converted into a suit for recovery of possession on the strength of title. Third appellant was also got impleaded by appellants 1 and 2 to support their case that there was an oral lease in favour of first appellant.

2. Plaint schedule property is an extent of 3 cents in Re-survey No.518/2 of Kappad village. As per plaint allegations property belongs to Thricherumana Devaswom in jenm right and was obtained by Kunhikannan Nair, husband of third appellant as per oral kuzhikanan right and after the death of Kunhikannan Nair, his widow third appellant granted an oral lease in favour of first appellant and while

first appellant has been in possession of the property under Ext.A5 assignment deed her rights were transferred to second appellant and later second appellant purchased the rights of third appellant under Ext.A4 and second appellant is thus in absolute possession and enjoyment of the property and respondents have no manner of right or possession over the same and therefore they are to be restrained by a permanent prohibitory injunction. Subsequently alleging that their title was disputed by respondents and appellants are entitled to recover possession of property on the strength of the title, plaint was got amended and third appellant was impleaded and third appellant admitted the alleged oral lease in favour of first appellant and the rights and title of second appellant.

3. In the written statement respondents contended that appellants have no title or possession to the plaint schedule property at all. It was contended that it is a portion of the property obtained by them from Chundakadan Elias Vydian who obtained jenmom right from Land Tribunal and appellants have no right or title to the property. It was also contended that even if appellants have any right, it was barred by adverse

possession and limitation.

4. Learned Munsiff framed necessary issues. On the evidence of PW1, DW1, Exts.A1 to A19, B1 to B16 and C1 to C6 learned Munsiff dismissed the suit holding that appellants did not establish their title to the plaint schedule property under Exts.A4 and A5 and they have no title to the property. Though appellants at the time of evidence have raised a claim basing on Ext.A2, that was also not upheld by trial court. Appellants challenged the decree and judgment before Sub court, Thalassery in A.S.108 of 1991. Learned Sub Judge on re-appreciation of evidence confirmed findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

5. Second appeal was admitted without formulating substantial questions of law. According to appellants substantial questions of law involved in the second appeal are

1) Whether courts below committed error in non suiting the plaintiffs without rendering a finding regarding title of the parties.

2) Whether courts have erred in the finding on the identification of the properties.

6. Learned counsel appearing for appellants and respondents were heard.

7. Learned Munsiff on an elaborate discussion of the evidence found that appellants have not established their title to the plaint schedule property. Learned Sub Judge also found that title sought to be proved at the time of evidence is a different title than what was alleged in the plaint and weakness of defence case will not enable plaintiffs to get a decree for recovery of possession on the strength of their title, without establishing title. Argument of learned counsel appearing for appellants was that courts below failed to note that respondents claimed right under Ext.A1 and under Ext.A1 north eastern portion of the whole property having a measurement of 13 x 9, six feet kols, were excluded and plaint schedule property is that excluded property and under Ext.A2 other legal heirs have released their right in favour of third appellant, widow of Kunhikannan Nair who under Ext.A4 transferred their right to second appellant who even otherwise under Ext.A5 has title to the property and therefore courts below should have granted a decree in their favour. Learned counsel appearing for respondents argued that

the only title set up in the plaint is under Exts.A4 and A5 and therefore appellants are not entitled to set up a different title which was not pleaded and no evidence could be looked into without foundation of the pleading and both the courts have rightly rejected the case of appellants and no substantial question of law is involved in the appeal.

8. True, under Ext.A1 while transferring the rights over the property covered therein, the assignor Kunhikannan Nair retained with him an extent of 13 x 9, six feet kols property, which lies on the north eastern corner of property while transferred thereunder. But unless appellants could successfully establish that the title of that property which Kunhikannan Nair had retained with him was obtained by them, they are not entitled to get a decree in the suit.

9. There was no pleading whatsoever, based on Ext.A2 release deed executed by other legal heirs of Kunhikannan Nair in favour of third appellant no title is claimed as legal heirs of Kunhikannan Nair, as was tried to be projected by learned counsel appearing for appellants. On the other hand, the title which was set up in the plaint was Exts.A4 and A5. Under Ext.A5 first

plaintiff transferred her right in favour of second appellant. Right which was transferred under Ext.A5 is the alleged right obtained by first appellant as per an oral lease from third appellant. Similarly, after Ext.A5, second appellant obtained Ext.A4 sale deed from third appellant. A reading of Ext.A4 makes it clear that, what was transferred under Ext.A4 is the right over the property which was transferred by first appellant earlier under Ext.A5. Neither Ext.A4 nor Ext.A5 show that the said property is the property which was retained by Kunhikannan Nair with him at the time of execution of Ext.A1 assignment deed. What was argued by learned counsel appearing for appellants was that under Ext.A2 the other legal heirs of Kunhikannan Nair had released their right in favour of third appellant and therefore third appellant had title to the property retained by Kunhikannan Nair at the time of execution of Ext.A1 assignment deed and by virtue of Ext.A4 that right vested with second appellant and therefore second appellant has title to the property. If that argument is accepted, identity of the property covered under Ext.A1 on the one hand and Ext.A2 and A5 on the other hand, is to be established.

10. A reading of Ext.A1 shows that the property transferred thereunder was the property obtained by Kunhikannan Nair as per an oral kuzhikanam lease for a period of 12 years with a liability to pay a purappadu of Rs.10/- from the Devaswom. Therefore, property which was retained by Kunhikannan Nair at the time of execution of Ext.A1 could only be the property which he obtained under an oral lease for a period of 12 years and where he has to pay a purappad of Rs.10/-. Ext.A2 establish that property covered thereunder is not the property retained by Kunhikannan Nair under Ext.A1. Though three items of properties are covered under Ext.A2, even according to appellants, item No.1 alone relates to the plaint schedule property. Ext.A2 shows that item No.1 of the said properties is the property obtained by Kunhikannan Nair as per an oral lease from the Devaswom for a period of five years with a liability to pay purappadu of Rs.1/-. Therefore, even if the right of Kubhikannan Nair vested with third appellant as one of his legal heir, the right transferred under Ext.A2 is the right over only a portion of the property obtained by Kunhikannan Nair on an oral lease for a period of five years with a liability to pay purappadu

of Rs.1/-. It cannot be the property which was retained with Kunhikannan Nair under Ext.A1. The two are different properties obtained under two different leases. If that be so, second appellant cannot claim any title to the property retained by Kunhikannan Nair under Ext.A1. As the case of appellants is that the plaint schedule property is the property retained by Kunhikannan Nair and as it is not established that second appellant has title to that property, they are not entitled to the decree sought for.

11. Fact that respondents did not establish their title to the property retained by Kunhikannan Nair under Ext.A1 as it was obtained by their assignor Elias does not mean that without establishing their title to the property appellants are entitled to a decree for recovery of possession on their title. In a suit for recovery of possession on the strength of title a plaintiff is entitled to succeed only on establishing his title. Neither the failure of the defendant to prove his title nor the weakness of defence case will enable the plaintiff to get a decree, in the absence of establishment of his title. Appellants did not establish their title. In such circumstances, courts

below were perfectly correct in non suiting the appellants. Under Section 100(5) of Code of Civil Procedure even when substantial question of law is formulated, at the time of hearing a respondent is entitled to argue that the second appeal does not involve such substantial question of law. No substantial questions of law is involved in the appeal.

Second appeal is dismissed.

M.SASIDHARAN Nair,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.440 OF 1993

1st June 2007

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